Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MICHAEL PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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115 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals err when it failed to adjust the Defendant's sentence to the extent that the Government became a co-defendant-protector of the bulk of the accused criminal activity?

2. Did the Court of Appeals err for affirming a four point leader/organizer enhancement of a Defendant effectively among equals and independent customers?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Petitioner Michael Perez, *pro se*, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The unpublished Opinion of the Third Circuit appears at Appendix B, pp. 2a-5a.[1] The unpublished Judgment & Commitment Order of the district court is found in the App., pp. 10a-20a.

STATEMENT OF JURISDICTION

The Third Circuit decided my case on October 1, 1998. *See* App., p. 3a. My petition for rehearing/rehearing *en banc* was denied on January 13, 1999. *See* App., pp. 6a-7a. Application No. A-774 granted me an enlargement of time to June 11, 1999 to file my petition for certiorari. *See* App., p. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appendix T is the Fifth Amendment to the United States Constitution. *See* App., p. 71a.

Appendix U is U.S.S.G. § 3.B1.1. *See* App., pp. 72a-75a.

STATEMENT OF THE CASE

In 1993, when Mr. Perez came to the attention of law enforcement authorities, he was a person driven by a deep heroin addiction. Although this condition deeply imbued him

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1. Appendix letters are omitted hereafter. *E.g.*, the reference to Exhibit B, pp. 6a-7a shall be noted as follows: "*See* App., pp. 6a-7a."

into drug trafficking for the support of his habit, he recognized his problem and sought private treatment of his own accord. *See* App., pp. 21a-22a.

When Mr. Perez moved into the distribution of kilograms quantities of cocaine, his margins could be as low as one hundred dollars and rarely as high as $1,500. (Information derived from tapes at trial). In between, there were the slow payers and the inevitable losses. So the profitability was constantly eroded by real world conditions.

On May 15, 1993 authorities sent Nicholas Delgado to buy a kilogram of cocaine from Mr. Perez. By that time they had been directly investigating Perez for over three months and listening to his telephone calls since February 16, 1993. They knew his associates, his modus operandi, his drug habit and his financial condition. The controlled buy, therefore, appeared to be the cap to the investigation.

Instead, the investigation simply continued as it had before. Perhaps investigators hoped that Mr. Perez would seek to expand his sources of supply or customer base. But a month after May 15, they knew he was dealing with all the same people and no others. The only thing changing was the amount of cocaine the customers were buying; Nicholas Delgado, by his own later admission, dealt with Mr. Perez on at least twenty occasions after the controlled buy for his own personal profit. Investigators say that they only learned of this fact after they recovered an accounting slip from Mr. Perez at his arrest naming Delgado as owing for twenty kilograms.

When the investigation was finally declared "over," it was eleven months and an alleged three hundred kilograms of cocaine past May 15, 1993. Only Mr. Perez and Edwin Rodriguez were arrested as principals to the drug operation;

of the seventeen defendants, only one drug courier from New York had been added to the list of known people that had not been known by May 15, 1993.

In a touch of ultimate irony, one co-defendant to the case, Mr. Pedro Pietro, was the Defendant's drug counselor. *See* App., pp. 23a-24a.

The only material change to the circumstances in the intervening year was the accumulation of an astronomical quantity of cocaine that authorities admitted had all been sold into the City of Philadelphia and the gross inflation of the Defendant's liability for laundering money.

REASONS FOR GRANTING THE WRIT

ISSUE I: SENTENCE MANIPULATION

CERTIORARI SHOULD BE GRANTED TO ADDRESS AN ISSUE OF FUNDAMENTAL AND RECURRING IMPORTANCE WHICH IS BEING DIVISIVELY TREATED BY THE CIRCUITS.

SUMMARY OF THE PETITIONER'S POSITION

A. Statement Of The Issue As Related To The Petitioner.

When present in a criminal controlled-substance case, the practice of sentence manipulation has the full potential to undercut the constitutional legitimacy of the defendant's ultimate sentencing. All the Circuits which allow a defendant to present a claim of manipulation of his conduct at his criminal sentencing have invoked a standard that the defendant must show a level of unacceptable outrageousness to the Government's actions. Discussion, *infra*. What has been overlooked is that in a controlled-substance case that

standard is immediately met; for if drugs are the absolute evil that they have been portrayed and legislated to be, it must follow that any case where the Government allows their distribution into the community satisfies the outrageous standard. It cannot be otherwise.

If it is permissible for the Government to cause or perpetuate a drug harm, then the "drug evil" cannot be absolute. The Government appears to perform or condone drug distributions routinely in the name of a greater "investigation." *United States v. Santana*, 6 F.3d 1, 5-6 (1st Cir. 1993) (discussing various scenarios in which Government distribution of drugs has been condoned; collecting cases). But if all that the Court is dealing with is relative, and the proscription is ambivalent, then it is not justifiable to superimpose absolute standards of sentencing over again, after having dispensed with them to create the sentencing situation. Yet, all the culpability is routinely visited on the criminal defendant in a drug-case sentencing by a determinant sentencing system. And it has been in this case:

> The District Court found that the Government did not engage in sentencing entrapment, see DA 291, and *we see no basis to disagree*. In any event, we have never approved a downward departure based on sentencing entrapment and decline the invitation to do so in this case.

See App., p. 4a.

The problem in this case is that the Government has been responsible for the distribution of the cocaine to an absolutely inordinate degree, so much so that Mr. Perez satisfies any standard of what a community would expect from its law enforcement agents. Mr. Perez could have been arrested in

May of 1993 when he was dealing his first kilograms in this case; he was outright caught in a sting operation where the Government bought one of those kilograms for $24,000. But instead of arresting Mr. Perez, he was allowed to keep the money and finance his larger scale dealing. Then he was allowed to continue in a *protected* business for eleven more months, until he had distributed between 150 and 300 kilograms of cocaine into the community!

The problem with the Government's participation in these events is that, except for its motive (which is legally irrelevant in a public welfare offense anyway), it became a drug dealer by aiding and abetting Mr. Perez instead of stopping him. Mr. Perez can say legitimately that he is primarily a Government-made man in at least two important respects: (1) that the Government seriously helped finance his transition into dealing in generally larger amounts than he had been (the Government informant was a major customer after the controlled buy, admitting to purchasing at least twenty times); and (2) the Government effectively protected all the dealings until it was ready to arrest so that no one else could arrest Mr. Perez. Frankly, Government collusion and incompetence is the *principal reason* why this sentencing reached anything approaching the quantities it did. Ultimately, of course, the Government was forced to admit it accomplished nothing that hadn't been accomplished by May 15, 1993; it should not have taken eleven months to discover that fact.

Accordingly, there are two important reasons why the Government lacks the necessary Constitutional standing to demand a full retribution on this Defendant: it does not stand blameless or only incidentally guilty itself and it cannot claim to have followed any objective or publicly sanctioned standard in its conduct of this investigation. The actions or inactions of the agents were completely *ad hoc* and unsupervised at policy-creating levels of Government.

And with respect to this Defendant, the milieu of his criminal conduct has lost contact with a real world. While part of the Defendant's crime remains real and sufficient for guilt, the greatest measure of his culpability is wholly contrived and artificial. It is quite one thing to permit one or two acts by a defendant in order to define the bounds of his criminality; but nearly every drug dealer is a "kingpin" in his heart simply deprived of opportunity. When that opportunity is supplied by Government largesse, it is no honest characteristic of the person or his circumstances. It is the final proof that the war is about arresting people, not protecting the people.

B. A Split Exists Among The Circuits Over The Proper Treatment To Be Afforded Excessive Government Involvement In The Creation Or Perpetuation Of The Criminal Offense Of Conviction When The Defendant Is Sentenced For His Crimes.

While acknowledging that it has "not yet had the occasion to address the theory of sentencing entrapment," the Third Circuit again finds that no conceivable standard has been met in this case. *See* App., p. 4a; quoted text from *United States v. Raven*, 39 F.3d 428, 438 (3rd Cir. 1994). The Petitioner will argue that this decision is violative of constitutional due process for being utterly standardless. And under the caselaw of the First, Eighth, and Tenth Circuits, the Petitioner would most likely have qualified for relief. Thus, he argues, that certiorari must be granted to resolve the split among the Circuits and set some standards for Circuits to follow in this field of jurisprudence.

At present, the Seventh and Eleventh Circuits have rejected the doctrines of sentencing entrapment or sentence factor manipulation outright. *United States v. Garcia*, 79 F.3d 74, 75 (7th Cir. 1996), *cert. denied*, 519 U.S. 858 (1996);

United States v. Williams, 954 F.2d 668, 673 (11th Cir. 1992). Other Circuits have held that sentence factor manipulation is a viable defense, but never found a case which qualified. *United States v. Stavig*, 80 F.3d 1241, 1245 & n.3 (8th Cir. 1996); *United States v. Rosa*, 17 F.3d 1531, 1551 (2nd Cir.), *cert. denied*, 513 U.S. 140 (1994); *United States v. Bara*, 13 F.3d 1418, 1420 (10th Cir.), *cert. denied*, 511 U.S. 378 (1994); *United States v. Connell*, 960 F.2d 191, 196 (1st Cir. 1992). Some Circuits have treated the subject multiple times. *United States v. Brewer*, 1 F.3d 51, 55 (1st Cir. 1993); *United States v. Barth*, 990 F.2d 422, 424-35 (8th Cir. 1993); *United States v. Rogers*, 982 F.2d 1241, 1245 (8th Cir.), *cert. denied sub nom., Philip v. United States*, 509 U.S. 912 (1993); *United States v. Calva*, 979 F.2d 119, 122-23 (8th Cir. 1992). Only the Fourth Circuit has distinguished between sentencing entrapment and sentencing factor manipulation, expressing "skepticism" about the latter theory. *United States v. Jones*, 18 F.3d 1145, 1153 (4th Cir. 1994). Thus, a situation has been recognized to exist since at least 1992 which arises with regularity in our jurisprudence, produces results differing upon the geographical venue of the case, and possesses no consensus even within these Circuits on how it should be resolved. This is the archetypical nature of a case requiring certiorari and Mr. Perez' example is fully pled in the Courts below by which to evaluate an extreme case.

C. Historical Development And The Current State Of Supreme Court Law On Entrapment And Outrageous Government Conduct.

Six Supreme Court decisions to date address the outrageous government conduct and/or entrapment defense.[2]

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2. One case, *Mathews v. United States*, 485 U.S. 58, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988) treats the availability of the entrapment defense where the accused still denies his factual guilt. The content of *Mathews* is not germane to the present issue.

In the first case of entrapment reaching the Court, the issue was framed as a question of police abusing their powers of detection of crime and enforcement of the law by instigating the criminal act. *Sorrells v. United States*, 287 U.S. 435, 448, 53 S. Ct. 210, 77 L. Ed. 2d 413 (1932). The Government argued that the actions of its agent were an extraneous issue to the subsequent legal treatment of the crime. Mr. Sorrells, it argued, could have met a "genuine" person with the attitude of the agent; he had just been selected to be tested and had failed.

Where the Government saw the actions of its agent as a purely superfluous matter, Justice Roberts found those actions to be the crux of the issue. *Id.*, 287 U.S. at 459. Although the majority decided that the overall question presented could be resolved by allowing the accused the right to present evidence of the Government's misbehavior for causing his personal conduct, Justice Roberts would have preceded the exercise of that right with an objective judicial evaluation of the constitutional reasonableness of the Government conduct in fomenting the crime.

This jurisprudence was not revisited until thirty-six years later when the Court heard *Sherman v. United States*, 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958). There a government informant had been permitted to stalk recovering addicts at a treatment center soliciting them to find him heroin to alleviate the pain of his addiction. The Court held that Sherman had been entrapped. But Justice Frankfurter now urged a proposition similar to that of Justice Roberts that the dispositive question was

> whether the police conduct revealed in the particular case falls below standards, to which

> common feelings responded, for the proper use of governmental power.

Id., 356 U.S. at 382.

After another twenty-five years, the Supreme Court took a case where the agent supplied a small amount of an essential chemical, not a controlled substance, in order to gain the trust and confidence of the subject individuals to his investigation. *United States v. Russell*, 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973). This was finally a case to be decided purely on a claim of outrageous government conduct because this particular defendant could not claim to have lacked predisposition. *Id.*, 411 U.S. at 430. The Court decided this case on the degree of illegal government involvement, *i.e.*, the supply of a small amount of a legal chemical capable of being misused, and found that conduct insufficient to constitute an egregious violation of the defendant's right to constitutional due process.

There was a dissent to this balancing approach because the Government had crossed the line into sanctioned criminality by aiding and abetting the ultimate offense. Stewart, J., *dissenting*, 411 U.S. at 441-43. In light of the reasoning of the dissent, even the majority acknowledged that

> . . . we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.

Id., 411 U.S. at 432-32.

Now the Court visited this issue again just three years later when it was presented a case where the defendant had

been pincered between a Government informant supplying heroin for sale and a Government informant shamming addiction as a customer. *Hampton v. United States*, 425 U.S. 484, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976). Here the Government had furnished an actual illegal substance, heroin, in order to consummate the crime. This definitely crossed the line and identified the Government as a recognized criminal law-breaker.

Nonetheless, the Supreme Court found that the tactic of a single distribution of the controlled substance under such tightly controlled conditions to protect the public weal did not deprive the defendant of due process of law. *Id.*, 425 U.S. at 490. Two Justices, Messrs. Powell and Blackmun, who concurred in the Opinion, would have held that it was fundamentally wrong to analyze only the personal due process rights of the accused. *Id.*, 425 U.S. at 492. The Dissent went further and would have held the prosecution

> barred as a matter of law where the subject of the criminal charge is the sale of contraband provided to the defendant by the Government agent.

Id., 425 U.S. at 501. For the dissenting Justices, some standards had to be drawn rather than treat every example of an entrapment/outrageous case on an *ad hoc* basis. The example of the Government engaging in criminality itself in order to allegedly fight crime was a readily identifiable brightline with obviously real meaning to the Public.

Current Supreme Court teaching on this jurisprudence has failed to address the possibility of restraints on Governmental power to detect and investigate crime but focused instead on an objective brightline test of the conduct of the defendant. *Jacobson v. United States*, 503 U.S. 540, 112 S. Ct. 1538, 118 L. Ed. 2d 174 (1992). So now the

prosecution is obliged to show in a case of the defendant claiming entrapment that the accused was disposed to commit the crime at the first instant he was contacted by a Government agent.

> Today, the Court holds that Government conduct may be considered to create a predisposition to commit a crime, even before any Government action to induce the commission of the crime.

Id., 503 U.S. at 556. Thus, there has not been a position taken at the highest levels of our jurisprudence to define the boundaries of acceptable Government conduct since *Hampton* in 1976. In *Jacobson*, the Supreme Court has exhibited great reluctance to allow a criminal defendant to benefit absolutely from the existence of misdeeds by his Government. It has been opined that the theory of objective entrapment is dead. *E.g.*, *United States v. Tucker*, 28 F.3d 1429 (6th Cir. 1994). And the Court is rightly concerned with allowing another wrong to become an undeserved windfall excuse to a criminal defendant for his uncontestable wrongdoing. However, it becomes equally unconscionable to let the substantive acts and omissions of police amounting to chargeable crimes on the community to be excused simply because they were done under the banner of law enforcement. That amounts to the same justification which the Court rejected when sought by the Defendants.

D. Application Of Objective Principles To The Current Case.

This Court must evaluate the facts of this case on two levels: first, toward the protection of the community and, second, for the protection of the person, even if he is the accused. For it is a *de facto* conclusion that overzealous investigations resulting in crimes will never be prosecuted

if the motive is ostensibly pure. And unless it has become the national purpose to utterly destroy all guilty citizens rather than correct people for the evil they do, then Government should not be a positive instrument of human destruction.

1. *Protection of the Common Weal.*

It is a testimony to how jaded the pursuit of the drug war enemy has become that persecution of the enemy becomes more important than preventing the harm. The Third Circuit has been so blasé that it completely ignores the significance and import of the 300 kilograms of cocaine itself having received Government-sponsored safe conduct in to the drug abuse of a community.

> Using the Eighth or First Circuit definition, this Court finds that the Government did not engage in sentencing entrapment. First, the Government officials did not engage in outrageous conduct or extraordinary misconduct, [sic] by merely delaying its [sic] arrest of Defendant Perez after it purchased [sic] one kilogram from him on May 15, 1993. The Government did not try to encourage Defendant Perez to sell larger quantities of drugs at any time therefore; it merely waited to gather more information on him and other potential Defendants. This is not improper. The fact that he was more deeply implicated in a drug conspiracy is not enough.
>
> Next, testimony by at least three witnesses revealed that Defendant Perez received cocaine in quantities ranging from 20-40 kilograms. Therefore, he was already predisposed to dealing much larger quantities of cocaine. Therefore, any relief based on this theory is denied.

See App., p. 69a. The decision of the District Court, quoted above, was accepted virtually *verbatim* by the Court of Appeals. The error by both Courts is the failure to see the positive support of all these later drug sales because it was passive, *i.e.*, non-interference and protective, in character. This protection was ostensibly for the sake of a greater investigation; but in hindsight that reason looks like purely a sham excuse. So the District Court has avoided making any balancing evaluation of result achieved versus the additional harm caused. Conspicuously unacknowledged by the District Court is the fact that the only part of the investigation to inflate during this time was the forfeiture count of the ultimate conviction, not any knowledge about additional dealers or customers. This was not a legitimate reason to continue.

There was a time in the not too distant past when the Government once acknowledged that the loss of just 13 grams of 92% pure heroin into the community was "a quantity, in absolute terms, unprecedented. *United States v. Santana*, 6 F.3d 1, 5 (1st Cir. 1993) (collecting prior case examples involving Government losses of drug). On review, *Santana* was nominally measured against the *Russell* standard, *supra*; but it more properly should have obtained its endorsement from *Hampton* for involving an actual drug. The *Santana* court adopted a wholly subjective and relative *ad hoc* basis for rendering its decision that there was no outrageous Government conduct present upon which to justify outright dismissal of the 13 gram distribution count of conviction.

The Government's justification, and the First Circuit's rationalization, in *Santana* represents a full quantum of extension of this Court's guiding principles in *Hampton*. Rather than total control, Judge Selya utilizes a risk/benefit analysis:

> But, if the big fish would have devoured millions of little fish, even the most tender hearted marine biologist would be hard pressed to argue against the fisherman's use of the net.

Santana, *id.* at 8. It does not need to be emphasized that the present case now constitutes a mega-factor enlargement on even the *Santana* principles of analysis. In hindsight, the Government's proposed justification must be acknowledged to be wholly gratuitous. This constitutes the point where the Courts must intervene to protect society from reckless law enforcement or law enforcement motivated by the greater recognition of the large prosecution. In such situations, the Courts of *nisi prius* must be given standards by which to guide the use of their supervisory power. *United States v. Hastings*, 461 U.S. 499, 505, 103 S. Ct. 1974, 1978, 76 L. Ed. 2d 96 (1983): A federal court

> may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.

Ibid.

There can be no mistake that the necessary situation is present in this case where the District Court would have been fully authorized to act. Without the silent partnership of the United States Government, no distribution of three hundred kilograms would have been possible. The Government conduct was illegal and prosecutable. Under such circumstances, the silence of the Courts becomes a subject for deep reflection and concern. It is a mockery not to treat the Government for what it has become but visit the total retribution on the Defendant. There is no distinction to public welfare guilt. The reputation of the Court and the welfare of the community are two of the imperatives recognized in *Hastings*.

2. *The Welfare of the Citizen-Defendant.*

Another aspect which is impacted in the District Court and Court of Appeals dismissive attitude toward any sentencing manipulation claim is the complete demonization of the Defendant. Such attitude is unfounded and impermissibly oversimplified the case facts. The proper application of the criminal law has long and very often been attributed by offenders as having saved them from their ultimately self-destructive behavior. That characteristic would have been a beneficial result of this case, but is completely unreferenced by the legal review.

Especially during the time of this conspiracy, Mr. Perez was acknowledged to have had a serious heroin addiction. Support of this habit was the principal reason propelling him into this drug trafficking. But as recounted in the Relevant Facts section, the profits at this level of distribution are the lowest of any point in the process. Mr. Perez sometimes sold a kilogram of cocaine only $100 over his own cost because he had to maintain volume to be competitive. The recorded phone conversations are replete with the dickering for price that forms an everyday part of the business at this level. Thus, even a $1,000 turnover, *i.e.*, the usual rate, was readily dissipated in a heroin habit costing $200 to $300 per day.

With agents so intimately connected to Mr. Perez' telephone life, they could hardly fail to see the driving force behind his labors. They even monitored his calls with his drug counselor when, after admitting his problem to himself, Mr. Perez sought help on his own initiative. It constitutes the ultimate cynicism that the drug law has so poorly served Mr. Perez himself, one of its penultimate victims.

The Courts are required to impose the most severe sentences imaginable for offenses in this genre and have an

inherent duty to evaluate the ultimate legitimacy of those sentences when they are finally applied to a living person. The evaluation in this case erroneously stopped with a mechanical evaluation of numbers. That it may not in good conscience do and still claim Mr. Perez received due process.

E. Proposed Treatment Of This Sentencing Manipulation.

Were the Petitioner to be granted certiorari, he would argue that this case is an example of the type of investigation and prosecution which should be subject to sentencing correction for the presence of extreme manipulation against the penal interests of the Defendant and the common weal of society for the failure to prevent the distribution of an immense amount of cocaine into the community. He would urge that the cumulative analysis of the jurisprudence of the First Circuit is the most appropriate by which to evaluate and correct the situation. The plain fact is that this Petitioner's situation fits so readily into the First Circuit's criteria that it is the *prima facie* example of what the Court should seek to prevent.

The first question to be addressed on review is whether the Government "merely provid[ed] a defendant with an 'opportunity' to commit a crime." *United States v. Gendron*, 18 F.3d 955, 961 (1st Cir.), *cert. denied*, 513 U.S. 1051 (1994). The situation here goes far beyond the offer of an isolated "opportunity" as contemplated in *Gendron*. Like most other Courts to consider sentence manipulation, *Gendron* is still thinking in terms of individual drug deals preceding arrest, not dozens and dozens of preventable kilogram sales. The scope of Government impropriety is envisioned in terms of the single deal, *i.e.*, encouragement to make a larger purchase or sale, the offer of an artificial price to make the deal larger, introducing guns where they were previously not involved, etc. It would be beyond the

comprehension of the *Gendron* panel for the Government to provide an eleven month license at the scale of dealing involved here.

Next is the question of whether the manipulation present reaches such a degree as to implicate either the due process right of the defendant or the public concerns subject to the supervisory powers of the Court. Mr. Perez satisfies this factor by the continuation of the consideration described above. This case contains "elements like these (*i.e.*, origin of the idea, encouragement to proceed, leadership, or protracted latitude to commit crimes, etc.) [that were] carried *to such a degree* that the Government's conduct must be viewed as 'extraordinary' misconduct." *United States v. Gibbons*, 25 F.3d 28, 31 (1st Cir. 1994) (emphasis in the original). The Perez case exhibits such a prolonged tolerance of his cocaine sales that it is incredible to claim any larger investigative purpose. The Government failed to save Mr. Perez from the ruination of his life and it failed to protect society from hundreds of thousands of doses of all forms of cocaine. Frankly, given the knowledge that law enforcement admits possessing, its failure to act was criminal in the true sense of the term. The fact that the cooperating Government informant dealt tens of kilograms at the same time he was supposedly being supervised indicates malfeasance as the least fault of the investigation.

Under the analysis in *Santana*, *supra*, and *United States v. Montoya*, 62 F.3d 1, 3 (1st Cir. 1995), the First Circuit identified the essence of manipulation and the evil which the action of the Court is intended to prevent: to stop the Government from "improperly enlarg[ing] the scope or scale of the crime" in order to increase a defendant's sentence. In this case, the period of time that investigators allowed Mr. Perez to deal cannot be balanced by any identifiable legitimate goal. It can only be associated with a purpose of

inflating the sentence to be imposed by a determinant sentencing system and likewise inflate the possible forfeitures and seizures of property involved. For example, if Mr. Perez had been arrested on May 15, 1993, his liability might have been 15-50 kilograms of cocaine and forfeiture or laundering of $100,000. By delaying the arrest until March 23 of the next year, those numbers became, to Government representation, more than 300 kilograms and $4,000,000. Furthermore, on May 15 there was no allegation of any "Mike Perez Organization," which authorities created out of either to justify their protracted investigation. (*See* discussion in next section). This was the type of statutory and Guideline manipulation realized.

As correction, the First Circuit suggests the following:

> Where the Government agents have improperly enlarged the scope or scale of the crime, the sentencing court has power to exclude the tained transaction from the guideline computations and for purposes of any mandatory minimum statute.

United States v. Egemoye, 62 F.3d 425, 427 (1st Cir. 1995). It is quite clear from the example in *Egemoye* and the Court's discussion therein that the First Circuit perceives much less than the excesses described in this Petition for Certiorari as qualifying to trigger the due process inquiry for the benefit of the Defendant and the evaluation of the gratuitous damage done to the community.

ISSUE II: SENTENCE MANIPULATION

CERTIORARI SHOULD BE GRANTED TO ADDRESS THE ISSUE OF SENTENCE MANIPULATION OF COLLATERAL SENTENCING MATTERS WHICH POSSESS INORDINATE PREJUDICE COMPARED TO THEIR ACTUAL SIGNIFICANCE.

It must now be clear from the discussion in the preceding section that the accumulation of drug quantity culpability by improperly extending the investigation might also affect collateral sentencing factors, such as the leader/organizer enhancements. The undue influence of the investigation in this case has produced a distinction corresponding to drug quantity for what is truly real and what has the taint of Government manufacture for its existence. One identifiable spillover effect of so long an investigation and allowed trafficking was the creation of an outright label, the "Mike Perez Organization," which did not exist on May 15. This labeling subtly influenced the District Court, Petitioner submits, into uncritically analyzing what type of defendant conduct comprised this trafficking crime in order to impose the full four-level enhancement. This enhancement of offense level produced a change from a best possible sentence of 235 months to a best possible of 360 months, which the Petitioner actually received. An enhancement of this scale was constitutionally unwarranted for the conduct which was truly attributable to Mr. Perez.

First, it is necessary to place conspiracy offense enhancements in perspective for their actual culpability in order to appreciate exactly how susceptible a great prejudice is to so little manipulation. The harm to society from a conspiracy resides not in the existence of an agreement at all but in the tort resulting from what the agreement accomplishes. *E.g.*, *Connelly v. Balkwill*, 174 F. Supp. 49

(D. Ohio 1959) (the tort of conspiracy is the tangible harm created; a civil cause of action is not created by the agreement alone without the harm). Frankly, in the criminal arena there is nothing about the heinousness of the crime that cannot be determined from adequate analysis of the substantive offense committed. The retribution owed to society is established on that basis; punishing the inchoate element of the crime appears gratuitous. If it were purely gratuitous, then the restraint upon a sovereign imposed by constitutional due process may prohibit the infliction of penalty. *Brown v. United States*, 356 U.S. 148, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958) (prohibition of writ of attainder is primarily a matter of self-imposed governmental restraint, but also a recognition on the limitations of the sovereign).

The concept that conspiracies became more dangerous than similar crimes perpetrated by individuals formally began with a conclusory statement of *dicta* in *Callanan v. United States*, 364 U.S. 587, 593, 81 S. Ct. 321, 5 L. Ed. 2d 312, 317 (1961):

> [C]ollective criminal agreement — partnership in crime — presents a greater potential threat to the public than individual delicts.

The fallacy, of course, is to equate "dangerousness" or "potential threat" with actual harm. While it may be possible in certain circumstances that the workings of a conspiracy produce a harm not encompassed by the proscribing statute, that situation is a rarity and *none* of the existent body of caselaw that your Petitioner has studied has produced an actual example of additional *harm* not encompassed by the penalty for drug quantity alone. And, regardless of the hypothetical possibility, none of the conspiracy laws were enacted for this reason.

When promoted for their enactment into law, none of the conspiracy statutes were ever offered on the basis of affording a method by which to compound the retribution visited on a defendant. Indeed, the original dismissive attitude toward conspiracy crimes, ranking them only as misdemeanors without the commission of the substantive crime itself, caused the penalty for the first federal conspiracy statute, 18 U.S.C. § 88, to be intentionally kept modest at five years. Francis B. Sayre, "Developments In The Law: Criminal Conspiracy," Harvard Law Review, Vol. XXXV, pp. 393-427 (1921-22).

Therefore, instead of being for retribution, all the original conspiracy statutes were promoted for the wholly proper reasons of supplying for the first time a statutory vehicle: (1) by which law enforcement could reach the masterminds of substantive crimes who distanced their participation from the actual deed, and (2) by which law enforcement could act preemptively in order to stop a crime before it materialized into a dangerous attempt. *Ibid.* The idea that the conspiracy added to the harm was not an aspect that was even believed at the time. It was still a widely held belief that when the substantive crime which was the object of the conspiracy was committed, the conspiracy leading to that offense was subsumed into the prosecution for the actual offense on society. *Callanan*, *supra*, 364 U.S. at 589.

But after passage of the original federal conspiracy law, it was soon argued that a five year maximum penalty might underrepresent the gravity of certain conspiracy offenses, like conspiracy to murder a federal official or conspiracy to violate civil rights. For a brief discussion, *see United States v. Parrett*, 870 F. Supp. 910, 911 (D. Utah 1994) (remarking on annotator's explanation of 1948 revisions to the conspiracy laws). For these early special offenses, and then for the original form of 21 U.S.C. § 846 enacted later, the

Court was authorized to sentence a convicted defendant for the same penalty as the substantive offense which was the object of the conspiracy, whether the final crime was achieved or not. But the sentencing court was always left free to exercise sound discretion in sentencing beyond the normative five year maximum penalty of general conspiracy. That was, of course, before the present era of determinant sentencing. Now the assessment of the District Court is pretty much reduced to a status determination whether some condition is present or not.

These brightline evaluations are what are fraught with opportunities for manipulation. The presence of the status triggers the penalty regardless of what that status really means in the context of the criminal offense. So extremely minor assistance, for example waiting for a phone call, relaying a message, receiving money, etc., that more properly amount to just convenience and not necessity are not distinguished from the instances of assistance that are essential to the functioning of the conspiracy. Nor is any distinction generally made between assistance performed either without any thought at all or as a favor and that assistance which is truly commanded. Fortunately, some Circuits recognize the necessity of these distinctions in the interpretation of Sentencing Guideline § 3B1.1 and demand a showing that the defendant exercised "direct and immediate control" over other participants. *E.g.*, *United States v. Greenfield*, 44 F.3d 1141, 1146-47 (2nd Cir. 1995). Such a finding was required in this case by Third Circuit law. *E.g.*, *United States v. DeGovanni*, 104 F.3d 43, 45-46 (3rd Cir. 1997) (must be some degree of control over others involved in the commission of the offense). But what was done here from lengthening the investigation was that agents were able to accumulate various and isolated instances and portray them as demonstrating a control that was neither substantial nor regular in real fact; the size of the drug quantity became the

surrogate for any penetrating proof of leadership. An example of the thinness of proof which the Government expected is contained in its Pre-Sentencing Memorandum. *See* App., pp. 25a-29a.

A. The Five "Participants".

In the sentencing of September 9, 1997 (*see* App., p. 30a), the District Court considered the leader/organizer enhancement for this case. Although on earlier occasion the Government has named other individuals that it said were supervised by Mr. Perez, in the final determination it named five persons: Fabiola Echeverry, Nelson David Guzman (a.k.a. Ramon Antonio Moya), Francisco Hernandez, Pedro Pietro Gonzales, and Ricardo Haines. Brief discussion of the participation identified for each of these individuals places this four point enhancement in its true context.

Of course, in this review this Court should be mindful that the vast majority of the conduct described occurred after May 15, 1993. Regardless, this was the best activity that the Government could offer in order to sanction coining the term, "The Mike Perez Organization," and presumptively these are the principals to that "organization."

Of all the people who potentially could legitimize a leader/organizer enhancement for activities before May 15, Fabiola Echeverry seems to be the most reasonable. But at trial the Government was forced to acknowledge that Ms. Echeverry was a serious cocaine dealer in her own right and the potential equal to Mr. Perez. Ms. Echeverry admitted under oath to dealing in serious amounts of cocaine before ever meeting Mr. Perez. *See* App., p. 33a. She had full kilogram customers for cocaine on her own throughout the conspiracy, such as Susana Rosa. App., p. 34a. At her arrest, she had records proving her own serious drug trafficking present in her home. App., p. 39a.

These activities were all wholly independent of Mr. Perez, but the Government did not attempt to distinguish them for what it alleged had been done *for* Mr. Perez.

At one point during the telephone intercepts, Ms. Echeverry is receiving ten kilograms of cocaine and asks the Defendant if *he* wants to buy any. App., pp. 40a-42a. And the Government attempted to portray a call after May 15 as Ms. Echeverry receiving a quotation for cocaine in behalf of Mr. Perez simply because the call was intercepted on the Defendant's cellular telephone. In point of fact, the agents making this claim knew that the phone was broken and only capable of making outgoing calls: Ms. Echeverry was making the call to the supplier for herself! App., pp. 43a-45a.

Without a doubt, Ms. Echeverry was a relative equal to Mr. Perez in her conduct throughout this conspiracy. While they lived together until August of 1993, they shared a mutuality of interest that is virtually indistinguishable. There was certainly no superior to inferior relationship as is required for the proper imposition of the enhancement. *United States v. Bell*, 28 F.3d 615 (7th Cir. 1994) (neither defendant exercising any materially greater responsibility over the other). If a demonstration of the "supervised person's attitude were necessary for the enhancement, then this enhancement would *a fortiori* fail:

> Court: So did you have an agreement with you and at least another person to distribute cocaine?
>
> Echeverry: No, I didn't have that.

App., pp. 46a-47a. This candid statement shows that Ms. Echeverry viewed herself as completely independent. What

gives the false impression of Ms. Echeverry being supervised at all is a misplaced stereotyping of the male and female roles[3] and the false reliance on the quantity alone for seeming to *necessitate* subordinates to assist, which was never true.

The Government was also something less than complete in its analysis of what it knew about Nelson Guzman (Ramon Moya). For purposes of this enhancement, authorities portray Guzman as keeping stash houses for the Defendant. *See* Sentencing Memorandum, App., p. 28a. But it knew that Guzman was an independent crack dealer who controlled the corner at 7th and Jefferson in North Philadelphia. App., p. 48a. The properties, therefore, were used for his packaging operations, making them completely unsuitable for Mr. Perez as stash houses. *Ibid.* But this simple critical fact went completely unmentioned at sentencing.

Furthermore, the one time authorities know of Mr. Guzman selling powder cocaine at one house, it was a sale of one kilogram purchased from a local dealer named Catano. *See* App., pp. 50a-53a for detail. This was a completely personal sale with nothing to do with Mr. Perez. In fact, Count 2 of the indictment (this sale) was redacted for the above reasons; but the drug sale was improperly resurrected at sentencing as supposed proof of an "organization."

Finally, Mr. Guzman openly testified that he bought from many sources besides Mr. Perez, based on all the usual market factors. *See* App., p. 53a. And other witnesses who understood their relationship called Mr. Guzman and Mr. Perez customer and supplier, respectively — nothing more. *E.g.*, *see* F.B.I. 302, App., pp. 55a-57a. It is a plain fact of this jurisprudence that customers do not count as persons led or supervised absent explicit instructions on how they

---

3. It should be noted that Ms. Echeverry was about fifteen years senior to Mr. Perez.

are to sell the drugs. *United States v. Torres*, 53 F.3d 1129, 1142-43 (10th Cir. 1995).

The stories to the other three "participants" are far less extensive than those to Ms. Echeverry and Mr. Guzman. The Government said at sentencing, App., p. 58a, that Ricardo Haines told authorities that he once helped the Defendant to unload 40 kilograms of cocaine. Otherwise, he was a customer who bought drugs wherever it was convenient. *See* App., pp. 60a-62a. Mr. Perez's drug counselor, Pedro Pietro Gonzales, admitted allowing Mr. Perez to store money in the basement of his home, but no drugs, "for a while." But he did so purely as a favor, not because he was ordered. App., p. 55a. And Francisco Hernandez, when he learned that he would be identified as an alleged member of the "Mike Perez Organization," produced an affidavit of denial for Mr. Perez to use at sentencing. App., pp. 65a-66a.

In short, these people are the "backbone" of the alleged "Mike Perez Organization." Clearly there has been an inflation of roles here or a dilution of the function necessary to actually lead or organize. What makes it possible for the reviewing Court to take such an uncritical posture in endorsing this enhancement is the overshadowing drug quantity. That number guarantees that the offense appears extensive, but that is not an honest reason for this enhancement when the taint of Government influence on the facts is removed.

The Petitioner, therefore, urges this Court to promulgate a standard which parallels the analysis described by the Tenth Circuit in *United States v. Owens*, 70 F.3d 1118, 1127-1130 (10th Cir. 1995). The position of the supplier in a drug conspiracy is always an important and even essential position with respect to the conspiracy's overall success. But the fact that the supplier is always an important figure cannot be

confused for the characteristics which constitute *forceful* promotion of drugs into the community. If there is a characteristic which makes conspiracy more dangerous to society than an individual delict, it is the potential for motivation of many over what they would do for themselves alone. The Government here, however, has been able to skew the Third Circuit's review on this issue by just its impermissible inflation of the criminal conduct, which seemed to make the foregoing analysis superfluous.

Certiorari should issue to resolve all the misplaced metaphors present in this and so many drug offense cases.

CONCLUSION

The concerns of this Petition reach an increasing number of prosecutions for drug offenses. Failure to address this example can only produce examples of greater magnitude from other litigators. But the current example is so extreme that it is impossible to see a reason to postpone consideration of the issues for better or different characteristics.

Wherefore, the Petitioner respectfully prays that this Court will grant the Writ of Certiorari and order a full briefing by the parties opponent.

Respectfully submitted,

MICHAEL PEREZ
Petitioner, Pro Se
F.C.I. Schuylkill
P.O. Box 759
Minersville, Pennsylvania 17954-0759
Unit 3B

APPENDIX A — LETTER OF THE OFFICE OF THE CLERK, WASHINGTON, DC ENLARGING TIME TO FILE PETITION DATED MARCH 22, 1999

OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

March 22, 1999

Mr. Michael Perez
P.O. Box 759
Minersville, PA 19106

Re: Michael Perez
v. United States
Application No. A-774

Dear Mr. Perez:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on March 22, 1999, extended the time to and including June 11, 1999.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By s/ Sandra Elliott Spagnolo
Sandra Elliott Spagnolo
Assistant Clerk

APPENDIX B — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED OCTOBER 1, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

97-1974

UNITED STATES OF AMERICA

v.

MIKE PEREZ,
a/k/a
MIGUEL PEREZ-CINTRON
a/k/a
MIGUEL PEREZ

Mike Perez,

Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA

(Criminal No. 94-192-01)
District Judge: The Honorable Herbert J. Hutton

Submitted Under Third Circuit LAR 34.1(a)
September 17, 1998

Appendix B

Before: SLOVITER, SCIRICA, and ALITO,
Circuit Judges

(Opinion Filed: OCT 01 1998)

MEMORANDUM OPINION OF THE COURT

ALITO, *Circuit Judge*:

I.

Mike Perez ("Perez") appeals from a final judgment in a criminal case entered following a jury trial for various drug-related offenses. Perez presents five arguments on appeal.

II.

First, he argues that in denying his post-trial motion for acquittal, the district court erred in concluding that the evidence was sufficient to support the conviction for money laundering. We have held that a "verdict will be overruled only if no reasonable juror could accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt." *United States v. Coleman*, 811 F.2d 804, 807 (3d Cir. 1987). After reviewing the record, we conclude that the evidence was sufficient to support Perez's money-laundering conviction.

Second, Perez claims that the district court abused its discretion in refusing to declare a mistrial after the prosecutor allegedly commented on the credibility of several witnesses.

We review this decision "for abuse of discretion, and, if error is found, we apply harmless error analysis." *United States v. Molina-Guevara*, 96 F.3d 698, 702 (3d Cir. 1996). After reviewing the record, we conclude that the district court did not abuse its discretion when it denied Perez's motion for a mistrial.

Third, Perez argues that the district court erred in enhancing Perez's base offense level based on a finding that Perez was "an organizer or leader of a criminal activity that involved five or more participants." In considering the district court's application of the Sentencing Guidelines, we review factual findings for clear error. Our review of the district court's legal conclusions is plenary. *United States v. Taylor*, 98 F.3d 768 (3d Cir. 1996), *cert. denied*, 117 S.Ct. 1016 (1997). We conclude that the district court had sufficient evidence before it to conclude that an enhancement was appropriate under U.S.S.G. § 3B1.1.

Fourth, Perez argues that the district court erred in denying a downward departure based on sentencing entrapment. Specifically, he contends that the government's failure to effect his arrest immediately after a 1993 undercover drug buy constituted conduct which was "egregious and outrageous so as to rise to the level of sentencing entrapment." The district court found that the government did not engage in sentencing entrapment, *see* DA 291, and we see no basis to disagree. In any event, we have never approved a downward departure based on sentencing entrapment and decline the invitation to do so in this case.

Fifth, Perez argues that the district court erred in calculating the amount of cocaine for which he was responsible. The district court found that the government had established, by a preponderance of the evidence, that Perez was responsible for conspiring to distribute more than 150 kilograms of cocaine. Accordingly, pursuant to U.S.S.G. § 2D1.1(c)(1), Perez's base offense level was determined to be 38. Perez claims that "vagueness" and "lack of specificity" in the record render the district court's conclusions invalid.

As we explained in *United States v. Collado*, 975 F.2d 985, 998 (3d Cir. 1992), "some degree of estimation must be permitted" in the calculation of amounts where not all of the drugs involved in a large-scale conspiracy can be seized and measured. Having reviewed the record, we conclude that the district court's estimates were properly grounded in fact. Accordingly, we conclude that the district court's conclusion was not clearly erroneous, and that Perez's base offense level was properly fixed at 38.

III.

For the foregoing reasons, we affirm the judgment entered on November 20, 1997.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

s/ [illegible]
Circuit Judge

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1974

UNITED STATES OF AMERICA

v.

MIKE PEREZ,
a/k/a
MIGUEL PEREZ-CINTRON
a/k/a
MIGUEL PEREZ

Mike Perez,

Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 94-192-01)
District Judge: The Honorable Herbert J. Hutton

Submitted Under Third Circuit Rule 34.1(a):
September 17, 1998

Before: SLOVITER, SCIRICA, and ALITO,
Circuit Judges

(Opinion Filed: OCT 01 1998)

Appendix B

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on September 17, 1998.

On consideration whereof, it is now hereby ordered and adjudged by this Court that the judgment of the District Court dated November 20, 1997, be and the same is hereby affirmed.

ATTEST:

s/ P. Douglas Sisk
Clerk

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JANUARY 13, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

97-1974

UNITED STATES OF AMERICA

v.

MIKE PEREZ,
a/k/a
MIGUEL PEREZ-CINTRON
a/k/a
MIGUEL PEREZ

Mike Perez,

Appellant

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and RENDELL, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who

participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

s/ [illegible]
Circuit Judge

DATED: JAN 13 1999

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED NOVEMBER 20, 1997

United States District Court
Eastern District of Pennsylvania

Case Number: 2:94CR00192-001

UNITED STATES OF AMERICA

v.

MIKE PEREZ

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

F. EMMETT FITZPATRICK, ESQ.
Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on count(s) 1,3,10,11,14,15 & 23. after a plea of not guilty.

Appendix D

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846	CONSPIRACY TO DISTRIBUTE COCAINE.	03/31/1994	1
21 U.S.C. § 841(a)(1)	DISTRIBUTION OF COCAINE.	03/31/1994	3
21 U.S.C. § 843(b)	UNLAWFUL USE OF A TELEPHONE.	03/31/1994	10,11,14 & 15
18 U.S.C. § 1956	MONEY LAUNDERING.	03/31/1994	23
18 U.S.C. § 2	AIDING AND ABETTING.	03/31/1994	3 & 23
18 U.S.C. § 1956 (a)(I)(A)(i)	MONEY LAUNDERING.	03/31/1994	23
18 U.S.C. § 2	AIDING AND ABETTING.	03/31/1994	2 & 23

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

Appendix D

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 168-58-5133	11/20/97 Date of Imposition of Judgment
Defendant's Date of Birth: 07/25/1964	
Defendant's USM No.: 47688-066	s/ Herbert J. Hutton Signature of Judicial Officer
Defendant's Residence Address: c/o F.C.I., BOX 280 FAIRTON NJ 08320	HON. HERBERT J. HUTTON, U.S.D.J. Name and Title of Judicial Officer
Defendant's Mailing Address: c/o F.C.I., BOX 280 FAIRTON NJ 08320	11/20/1997 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 360 month(s).

Appendix D

360 months on Counts 1 & 3.
48 months on Counts 10,11,14 & 15.
240 months on Count 23; all to run CONCURRENTLY with each other.

* * *

☒ The defendant is remanded to the custody of the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s)

5 years on Counts 1 & 3.
1 year on Counts 10,11,14 & 15.
3 years on Count 23; all to run CONCURRENTLY with each other.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

Appendix D

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision

* * *

Appendix D

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with

any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of testing and treatment for alcohol and drug abuse, as directed by the probation officer.

Appendix D

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine
Totals:	$ 350.00	$ 5,000.00

* * *

FINE

* * *

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ The interest requirement is waived.

* * *

Appendix D

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

* * *

B ☒ $ 350.00 immediately, balance due (in accordance with C, D, or E);

* * *

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Fine payments shall be made through the Inmate Financial Responsibility Program.

* * *

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal

monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

* * *

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Paragraphs 29 & 39: 2-point enhancement withdrawn for obstruction of justice.

Guideline Range Determined by the Court:

Total Offense Level: 42

Criminal History Category: I

Imprisonment Range: 360 TO LIFE.

Supervised Release Range: 5 YEARS.

Fine Range: 25,000.00 to $ 6,500,000.00

☒ Fine waived or below the guideline range because of inability to pay.

* * *

Appendix D

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

* * * *

APPENDIX E — EXCERPTS FROM PEREZ SENTENCING TRANSCRIPT DATED NOVEMBER 20, 1997

* * *

. . . that if he was really minimizing this conversation, the CI, which I was trapped with, he would have never been — he would have never gotten in the trouble that he got. If they were really listening to these conversations, the guy would have not been locked up, they would have stopped the guy on time. And that's part of the amounts on the records. They would have stopped listening to the guy on time. And I still feel that this is misconduct. And they has me, 'cause of this misconduct, not my misconduct, his misconduct.

Also, I had some drug problems in the institution. Before I came to the institution, I was in the methadone program. I went looking for help. When I got there, a guy by the name Pedro Gonzales was my counselor. I was in a program and I told him my situation. Well, he said to me, it's fine. He put me on forty milligrams of methadone. A month later, I was on eighty milligrams of methadone. I give him dirty urines on heroin. He didn't stop me. I went for private — I was paying $45.00 a week, a hundred and eighty dollars a month, your Honor, I was trying to clean myself. Rehabilitate myself.

Your Honor, in all this stuff — and when it comes to trial, this man was my co-defendant. I looked for help, your Honor, I try. Now, look at — I'm —

I don't know what you're thinking, your Honor, but I'm talking with my heart. I don't come here — it's been almost four years, your Honor.

* * *

Appendix E

At times, I get stressed, I'm confused. I don't know what's reality. In prison we are all there, people think about this, this one thinks about that, but we're human and we all make mistakes, your Honor. This was not my mistake. I looked for — for help. Eighty milligrams of methadone is something to put you out of your range, plus using heroin daily.

Also, Ms. Echeverry, she testified that I introduced all these people to her. No. It's not like that, your Honor. You let loose people that are out there, that is worse. They say — the Bible says, your Honor, once you clean yourself, is all right, you take the demon out. But once you come — the demon come back, it comes back with seven more. That's what you let out out there, your Honor.

Look at Mr. Haines. I got affidavits right here, your Honor. If you read this affidavit, your Honor, I don't think you'd be able to sentence me today.

MR. FITZPATRICK: Do you want me to read this?

THE COURT: Do you want a response?

THE DEFENDANT: Mr. Moya — yes.

THE COURT: You have an attorney, he makes those judgments, sir.

THE DEFENDANT: This is —

THE COURT: You can give the affidavit to your attorney and if he decides he thinks it's of a merit of some kind, he'll raise it with me.

* * * *

APPENDIX F — EXCERPTS FROM VOLUME 5 OF PEREZ TRIAL TRANSCRIPT

* * *

Pedro Pietro-Gonzalez – Direct

Q. Theology?

A. Yes.

Q. And were you ordained?

A. Yes.

Q. Did you have any other employment?

A. Yes, I was working in two clinic. Drug addiction clinic in Philadelphia.

Q. Did you ever work as an aircraft oven operator?

A. Yes. Oh, yes, with Sikowski Aircraft.

Q. And did you ever work as an superintendent of maintenance at a bank?

A. Yes. City Trust Company.

Q. Did there come a point in your life when you started to use heroin?

A. Yes.

Appendix F

Q. Did you become addicted to heroin?

A. Yes.

Q. Have you since stopped using heroin?

A. Yes, around a year and a half, two years.

Q. Did there come a point in time when you became involved with the distribution of cocaine?

A. Yes.

Q. Did you enter a guilty plea with respect to that distribution?

A. Yes.

* * * *

APPENDIX G — GOVERNMENT'S SENTENCING MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JUNE 3, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CRIMINAL NO. 94-192-01

UNITED STATES OF AMERICA

V.

MIKE PEREZ, a/k/a "Miguel Perez-Cintron," a/k/a "Miquel Perez"

GOVERNMENT'S SENTENCING MEMORANDUM

The United States of America, by its attorneys, Michael R. Stiles, United States Attorney for the Eastern District of Pennsylvania, and Roberta Benjamin, Assistant United States Attorney for that District, submits the following memorandum in aid of sentencing.

I. *THE GUILTY PLEA*

On November 2, 1994, a federal grand jury in the Eastern District of Pennsylvania returned a 41-Count Superseding Indictment charging the defendant with conspiracy to distribute cocaine, in violation of 21 U.S.C. §846 (Count One); distribution of cocaine, in violation of 21 U.S.C. §841(a)(1) (Counts Two and Three); possession with intent

to distribute cocaine, in violation of 21 U.S.C. §841(a)(1) (Count Four); unlawful use of a telephone, in violation of 21 U.S.C. §843(b) (Counts Seven through Twenty-One); money laundering, in violation of 21 U.S.C. §1956(a) (Count Twenty-Three); criminal forfeiture, in violation of [text illegible] (Count Twenty-Four); criminal forfeiture, pursuant to 18 U.S.C. §982 (Count Forty-One); and aiding and abetting, in violation of 18 U.S.C. §2. On April 11, 1996, the government moved to redact the Superseding Indictment so that the defendant was facing charges only on Counts One, Three, Ten, Eleven, Fourteen, Fifteen, and Twenty-three at trial. The forfeiture counts (numbers 24 and 41) were bifurcated for separate consideration by the jury in the event the defendant was found guilty of the substantive counts. On May 16, 1996, following a jury trial before the Honorable Herbert J. Hutton, the defendant was found guilty of all the substantive counts. Also, on May 16, 1996, the defendant waived his right to a trial by jury of the forfeiture counts and agreed to have the Court decide that issue at the time of sentencing.

II. *MAXIMUM SENTENCE*

The maximum sentence for Count One of the Superseding Indictment is life imprisonment, with a ten-year mandatory minimum, at least 5 years supervised release, a $4,000,000 fine, and a $50 special assessment. On Count Three, the maximum term of imprisonment is 40 years, with a five-year mandatory minimum, at least 4 years supervised release, a $2,000,000 fine, and a $50 special assessment. On each of Counts Ten, Eleven, Fourteen, and Fifteen, the maximum term of imprisonment is four years, not more than

one year supervised release, a $250,000 fine, and a $50 special assessment. On Count Twenty-three, the maximum term of imprisonment is [text illegible] years, not more than 3 years supervised release, a $500,000 fine, and a $50 special assessment.

III. *SENTENCING GUIDELINES CALCULATION*

The government agrees with all the offense level computations set forth in the Presentence Report including the following:

(1) The base offense level is 38 because the amount of cocaine that the defendant is reasonably foreseeably responsible for is more than 150 kilograms of cocaine;

(2) Section 3B1.1(a) provides a four-level enhancement because the defendant was the leader of criminal activity involving at least five participants;

(3) Section 3C1.1 provides a two-level enhancement for obstruction of justice. This is supported by the testimony of Fabiola Echeverry at trial and at her sentencing hearing on April 3, 1997.

(4) The Criminal History Category for the defendant is I; and

(5) The guideline range for imprisonment is life.

Appendix G

IV. *SENTENCING CONSIDERATIONS*

As the evidence at trial revealed, the defendant was the leader of a major cocaine distribution organization (the "Mike Perez Organization") that dealt illegal drugs in Philadelphia and was supplied multi-kilogram quantities of cocaine from New York City, Columbia, and Puerto Rico. Numerous individuals reported to Mike Perez, which is, in part, evidenced by the Indictment that was [text illegible]. The defendant's activities demonstrated that the defendant's drug distribution was not only a source of income for him but also a complete way of life. In particular, the testimony at trial of Fabiola Echeverry (the mother of one of the defendant's children), Pedro Prieto Gonzalez (the defendant's drug counselor), and Ramon Antonio Moya (one of the defendant's co-conspirators on whom the defendant relied extensively) revealed that the defendant did not consider the effect of his drug distribution activities, but rather exploited people in order to further his illegal activity. As to Fabiola Echeverry, the defendant threatened her while they were in prison together on these charges in order to convince her not to testify. As to Pedro Prieto Gonzalez, the defendant used him in order to store drug money at Gonzalez' house. As to Ramon Antonio Moya, the defendant put him in charge of storing drugs and money at other stash houses in Philadelphia. In using these other individuals, the defendant attempted to distance himself from the cocaine and drug money. In addition, of course, the defendant exploited numerous other individuals who worked for him, who used illegal drugs, and society as a whole (in the effect such criminal activity presents).

Appendix G

The extensive illegal activities of this defendant support the Sentencing Guideline range in which he falls. In light of this, the government submits that the only appropriate sentence is one of life imprisonment. Only then can society be assured that the defendant will not be able to threaten the streets with future criminal activity.

Respectfully submitted,

MICHAEL R. STILES
United States Attorney

s/ Thomas J. Eicher
THOMAS J. EICHER
Section Chief
Assistant United States Attorney

s/ Roberta Benjamin
ROBERTA BENJAMIN
Assistant United States Attorney

APPENDIX H — EXCERPTS FROM PEREZ SENTENCING TRANSCRIPT DATED SEPTEMBER 9, 1997

[commencing at page 10]

. . . I'm saying to this Court here, what the government has shown is exactly what it showed in *Belleteri* and the Third Circuit said that they are not entitled to a four-level enhancement.

We come to the problem that I intended to address next, when we got into amounts, but these problems are so interconnected that I apologize for mixing them up.

THE COURT: No, that's all right. But you'll allow the Court for the edification of the Third Circuit review — if you'll allow me to rule on each one as we move along I think it will aid in avoiding some confusion.

MR. FITZPATRICK: Surely, sir, yes.

THE COURT: In this situation my recollection of the trial testimony comports with that of the Assistant United States Attorney and I will therefore overrule your objection and adopt, with specificity, paragraph 32 of the Pre-Sentence Investigation report in that in my view and recollection the amount of drugs to which Mr. Perez is being held responsible for is in the amount 300 kilograms and that it is, in fact, based on the taped conversation and on information testified to at the time of trial by witnesses as to their relationship to him and his leadership role in the organization. Therefore, as I've indicated, your motion is denied.

Appendix H

What is the next issue, sir?

MR. FITZPATRICK: Well, the next issue, sir, was the amount of drugs, independent of —

* * * *

APPENDIX I — EXCERPTS FROM VOLUME 4 OF PEREZ TRIAL TRANSCRIPT

[commencing at page 4-45]

Echeverry – Cross

. . . where you were taken from prison and brought to the Government's office beginning on April 1st of 1996. Does that refresh your recollection?

A. Yes. And also Mike was brought over as well with me.

Q. Pardon me?

A. Yes. I was brought down. Mike was brought down also.

Q. Mike was brought down with you?

A. Yes, he was brought down. When we were arrested I met up with him down there.

Q. I'm not talking about when you were arrested. I'm talking about after you were in jail, after your lawyer came to see you and said if you testify against Mike, the Government will ask for a more lenient sentence. After that happened, you were brought down about 32 times to talk to the Government about these tapes and about your deal?

A. Yes. I told you I was brought down —

Q. 32 times?

A. — a number of times. Well, you've counted them, I haven't.

Q. And they asked you to listen to tapes?

A. Yes, they asked me to listen to tapes.

Q. Now, did you explain to the Government that you had been dealing cocaine before you met Mike Perez?

A. I explained that to them. That was the truth.

Q. You told them that you had been dealing cocaine before you . . .

* * *

[4-63] Echeverry – Redirect

Q. Do you know every individual in the United States?

A. I don't think anybody can know who the other person is in each country.

Q. So you lived in Colombia for some of your life, is that right?

A. I lived, yes, in Colombia for part of my life.

Q. Do you know all Colombians?

A. No, I don't know all Colombians.

Q. Do you recall there were times when we said we'll see you later this week, we'll see you next week and then we wouldn't see when we were trying to discuss what had happened on these tapes?

A. It's impossible for me to say how many times or when.

Q. Were there times when you thought you were going to be brought in and you weren't?

A. Yes, this is true. On many occasions I came and you didn't see me. Many occasions.

MS. BENJAMIN: Can I have just one minute, your Honor?

THE COURT: Certainly.

(Pause in proceedings.)

BY MS. BENJAMIN:

Q. Do you know an individual named Susanna Rosa?

A. Yes, I know her.

Q. Do you remember having conversations with her where she [4-64] called you and asked to purchase a kilogram of cocaine for a friend of hers?

A. Yes, I remember.

Q. And you agreed that you would try to do that?

A. Yes.

Q. And whose cocaine was that that you were going to provide her with?

A. I told her that I was going to ask Mike whether he could give me a kilo.

Q. So even though you negotiated that with Susanna over the telephone, when you were cross-examined and the word independently was used, that you independently dealt cocaine, did you consider that negotiation independent of Mike?

A. Well, the way which it, you know, it turned out, yes.

Q. But whose cocaine was it?

A. The cocaine was the cocaine that was brought down for Mike.

Q. And did the Government promise you any specific sentence that you would get as a result of your cooperating?

A. No, I wasn't promised any particular sentence.

(Pause in proceedings.)

MS. BENJAMIN: I have nothing further, your Honor.

THE COURT: Any recross?

Appendix 1

RECROSS-EXAMINATION

BY MR. FITZPATRICK:

* * *

Q. You start discussing money. There are — excuse me — start discussing numbers. There are a thousand, the total it's 1,900. Then you say, 60, it's written here, 1,000, look, 1,614 plus what, plus 3-80 and it continues. What were you talking about there?

A. We were talking about some money that she was asking for.

Q. When you say she, who do you mean?

A. Yolanda.

Q. And was this money she felt that she was owed?

A. Yeah, it was money that was still outstanding from the previous time, the previous trip.

Q. And that previous trip was concerning what?

A. It was money for the cocaine that she was missing.

Q. On Page 2 of the transcript, you say, do you want to go by and show it to you and Mike Perez says, no, no, go to Charlie's house, pick that up and give it from there. What did you understand Mike to mean by that?

Appendix I

A. To go by Charlie's house, pick up the money over at his house and to give it to Yolanda.

Q. Further down on Page 2, you say I don't understand these numbers, 1,614 with 60 it says here but like it can't be. Is it 60 cents? What were you referring to?

A. Well, to the account that was recorded in the paper which wasn't clear.

Q. Which paper was this?

* * *

A. It was a piece of paper that she had brought.

Q. By she, you mean Yolanda?

A. She's Yolanda.

Q. When you say is it 60 cents and Mike says 60 cents, you say no, he says there was no change in that. What did you understand him to mean by that, there was no change in that?

A. There were never any coins in the moneys that were sent.

Q. With respect to this cocaine?

A. Yes, with respect to the money for the cocaine.

Q. And then Mike says, ask her. Did you understand him to mean Yolanda?

A. Yes. The same Yolanda.

Q. And then Mike says — you say, she says that she doesn't know either and Mike says, well have her call. What did you understand him to mean by that, have her call?

A. Well, that she — that she hadn't recorded numbers on the piece of paper. So she didn't know anything about what was stated there and she would have to call the person.

Q. Who did you understand him to tell her — have you tell her to call?

A. Well, the person that had given her the paper, the owner of the money.

Q. Then Mike Perez on Page 2 says, I know that it was 1,000 and a bit more and, and something that you owed that she said that was missing. What was he referring to there?

* * *

[4-10] Echeverry – Direct

A. The money.

Q. On Page 3 of the transcript, Mike Perez says, 380 and 1,100. You say 1,100. What were you referring to there?

A. We were referring to the same count of money.

Q. Then Yolanda said, ask him if he has the little paper from the last time. What did you understand him to mean by that?

A. That she returned, she would come down and she would bring a note with an account. So she was asking him to check the account, the previous account.

Q. And again this was for the same business?

A. Yes, the same, the same business with the cocaine.

Q. And then Mike says, well, when you get it, we'll go over Charlie's house and get them. And this was the same Charlie from before?

A. The same person.

Q. Were there times when you did go over to Charlie's house?

A. Yes.

Q. Had Mike —

A. I would.

Q. — told you to?

A. Yes.

MS. BENJAMIN: At this time, the Government will play Government Exhibit 7A, Tab 170.

(Government Exhibit 7A, Tab 170, is played at this time.)

* * * *

APPENDIX J — EXCERPTS FROM VOLUME 3 OF PEREZ TRIAL TRANSCRIPT

[commencing at page 3-30]

Echeverry – Direct

Q. And why were you organizing it?

A. Because he asked me to do so.

Q. And when you say, he, you mean whom?

A. Mike.

MS. BENJAMIN: We can now play Government Exhibit 7A/B at Tab 33.

(Government Exhibit G-7A/B, Tab 33 is played at this time in open court.)

BY MS. BENJAMIN:

Q. Could you hear that conversation?

A. Yes.

Q. And who was — can you identify who was speaking, please?

A. Yes, Mike and me.

Q. And is the index properly identified, the Fabiola and Mike index, for who was actually speaking and what they said?

A. Yes.

Q. I draw your attention to the date, March 4th, 1993. This was the day after the last conversation you just testified about, right? When Mike says:

What happened?

And you say that: Only one zero came.

What did you mean by one zero?

A. I'm referring to ten kilos of cocaine.

Q. And where did they come from?

A. They were coming from New York.

[3-31] Q. Further down on the transcript when you say: Well, since the other boy is coming, yes, do you want to or what?

And then Mike Perez says: No, use it.

What did you mean by the other boy is coming?

A. That there was another person from New York coming with more cocaine.

MS. BENJAMIN: We'd now like to play Government Exhibit 7A/B, Tab 41.

Appendix J

(Government Exhibit G-7A/B, Tab 41 is played at this time in open court.)

BY MS. BENJAMIN:

Q. Can you identify the people who were speaking in that conversation, please?

A. Yes, it's me and Mike.

Q. And does the transcript accurately reflect where it says, FE, is you and MP is Mike, that you said, hello and he said, uh huh, it's all right, et cetera through the conversation?

A. Yes.

Q. And, again, you've seen all these transcripts before, is that right?

A. Yes, I have seen them.

Q. I direct your attention to the date, March 4th, 1993, it's the same day as the last conversation, is that right?

A. Yes.

Q. When Mike Perez says: It's all right, those people came. . . .

* * * *

APPENDIX K — EXCERPTS FROM VOLUME 4 OF PEREZ TRIAL TRANSCRIPT

[commencing at page 4-32]

Echeverry – Cross

A. When I pled guilty, and this is not my trial, it's Mr. Perez's trial, and I don't believe that I'm here, you know, because I take pleasure in doing this. I do not hate him. He is the father of my daughter. This is not easy for me.

Q. Nobody said it was.-

A. But he didn't accept his guilt.

Q. But you're doing something very difficult in order to save yourself time in jail, is that correct?

A. It's not easy for me to come here. If I know that I'm guilty, I accept the responsibility and I told him time and again to do the same thing. Please.

Q. Well then, why don't we tell the complete truth. Why don't you now tell us whether you were or were not on your own dealing cocaine in the time that Mike Perez was living there?

A. I wasn't independent.

Q. You were not independent?

A. No, I wasn't. My brother was here.

Appendix K

Q. Did you ever buy drugs or cocaine from people in New York for yourself?

A. Mike told me to do so.

Q. And you never did it except what Mike told you to do?

A. Yes.

Q. When Mike was in Puerto Rico, you took his cellular phone and you called drug dealers in New York, is that right?

A. Yes, the phone rang once, the cellular phone rang once and [4-33] that was the only opportunity which I picked up that phone and I picked it up because he left it at the house.

Q. And you talked to someone in New York named Hector?

A. Well, yes, I would always do that.

Q. Hector is your cousin, isn't he?

A. No, he's not my cousin. He's not a relative of mine.

Q. Hector is no relation at all to you?

A. No, he is not my family. I didn't know him before he came here to Philadelphia.

Q. That's when you first met him when he came here to Philadelphia?

Appendix K

A. Yes, sir. You know it's true.

Q. Hector is from Colombia, isn't he?

A. He is from Colombia.

Q. And you're from Colombia?

A. Yes, I am Colombian.

Q. Now, how about Yolanda?

A. Yolanda is an acquaintance, a friend.

Q. You knew Yolanda before you knew Mike Perez, didn't you?

A. Yes, I did. Of course.

Q. And Yolanda used to deliver drugs to you individually, didn't she?

A. Yolanda used to come to my house and would deliver drugs, yes.

Q. She was from your same home town in Colombia, is that . . .

* * * *

APPENDIX L — EXCERPTS FROM PEREZ SENTENCING TRANSCRIPT DATED NOVEMBER 20, 1997

[commencing at page 11]

. . . the Court whether or not she distributed — she admits to distributing, Judge — pardon me — distributing cocaine on behalf of my client.

Mrs. Echeverry was never asked on the stand, how much drugs did you get from my client. There was an admission that she was independently dealing drugs. There was a statement given to the FBI that said, my brother, who lives in the same house, he's dealing drugs, we're all Colombians. This was the source of the $139,000.00 that was seized on the New Jersey Turnpike and the driver said it came from the Colombians and, of course, the Court knows, my client is not a Colombian.

Now, Mr. Bowers (ph), asked her at Page 8 of her plea before this Court:

> What did you do — what did you help him do — meaning she helping Mr. Cintron?
>
> I would make calls for him, sometimes I accompanied him and I also picked up some money for him.

And the Court says at Page 9:

> Now, Count 25 of the indictment charges you with conspiracy to distribute cocaine. So, did we have an

agreement with you and at least another person to distribute cocaine?

Her answer to the Court was: No. I didn't have that.

Mr. Bowers: The Judge is asking you and maybe I can address.

[12] THE COURT: Please, please.

MR. BOWERS: Judge, her role — and I think we all agree — is aiding and facilitating Mr. Perez in the distribution of substances.

So, she did not distribute and did not admit before this Court, in spite of the fact that the Government comes in today and says, she's responsible for a hundred and seventeen kilos.

Now, what does this bring us to, to get down to what we're here for today, sir? This is an argument about categories. In my humble opinion, sir, it is an argument about destroying the life of Mr. Cintron by sentencing him to life imprisonment. I'm certainly not urging the Court to turn him loose upon the community.

What I am going to do — because he's thirty-three years of age and I think in spite of what he's done before — he has no prior criminal record and he does not deserve a life sentence. The Court has already — although it's not chiseled in stone — said that he gets four more points for being a supervisor. I think the Court today could change that, if it wanted.

Appendix L

What I am trying to do and the only purpose that I stand before this Court, sir, is to try to get my client less than life imprisonment. And why do I do that? The time that he serves may very well come out to be almost the same, but the . . .

* * *

[31] Now, continue, please.

THE DEFENDANT: Your Honor, Mr. Moya, he's out there. The Government knew he was running a drug corner — a crack cocaine corner — how can I be this guy's leader? How can I be a guy's crack cocaine leader? You tell me that question, your Honor. Can you give me an answer? How can I be somebody like that leader?

Everyone was independent. My job was — I didn't even have no job. Just because I know Mrs. Echeverry — I have a daughter with her, your Honor. The reason how I met her was — how I met her, your Honor — but I — the reason how she got that kid was — it got in my mind that she was ten years by herself. Me, as a man, and you as a man, your Honor, I believe that would — sit to your head and you would — free man.

So, I want halfway. She had a child. Now, I know she has everything on her hands. I'm ignorant. Her brothers — she says in the indictment and during trial that her brother was there. Her brother was not there, your Honor. There's a lot of things this Government hiding, your Honor. Her brother is not there. Has not been for — last years, waiting to talk to you, your Honor.

Appendix L

MR. FITZPATRICK: Do you want me to read this?

THE DEFENDANT: I'm not the guy the Government thinks I was and did I see — he didn't stop me with the money and now, today, they want $4 million.

* * * *

APPENDIX M — EXCERPTS FROM VOLUME 5 OF PEREZ TRIAL TRANSCRIPT

[commencing at page 5-130]

R. Moya – Cross

Q. When Perez stated he had a little job around, Moya knew that to mean he could sell cocaine for Perez.

A. That means that he had work and he could give me some cocaine.

Q. Did you sign a plea agreement with the Government?

A. Yes, sir.

Q. Do you remember when you signed it?

A. I can't recall the date.

Q. Can't recall the date?

A. I don't recall the date on which I signed it.

Q. Did you look at it before you went on the stand?

A. No.

Q. Do you remember what month it was?

A. No, I can't recall that, either.

Appendix M

Q. Do you remember what year it was?

A. Not exactly, no, I can't recall.

Q. Do you remember if it was in the '80s or the '90s?

A. Ah, yes, I understand. It was in the decade of the '90s, you know, and it was between '93 and this day.

Q. It was between '93 and this day?

A. Yes, sir.

Q. When were you arrested?

A. October 9th.

Q. What year?

A. Of '93.

[5-131] Q. Were you arrested in connection with anything you were doing with Mr. Perez or with another event?

A. No, at that time I was with Mr. Alejandro Londono.

Q. Was your arrest for selling drugs?

A. At that time Alejandro Londono was going to make a sale.

Q. To whom?

Appendix M

A. Somebody that I don't know.

Q. You were going to make a sale?

A. Alejandro Londono.

Q. I'm sorry, Alejandro and I?

A. Londono, L-o-n-d-o-n-o, it's a surname.

Q. Who was going to make the sale?

A. Alejandro Londono.

Q. And what were you charged with?

A. I was charged because I was found in the apartment precisely at the time where Alejandro had the kilo of cocaine and I was arrested there and then.

Q. What were you charged with?

A. The charges I can't — I can't remember the charges. At that time I didn't understand any English at all and . . .

Q. At the time of your arrest, you did not understand any English at all?

A. No.

Q. But you were arrested and charged?

Appendix M

A. I was taken to prison and I've been in prison until today. . . .

* * *

[5-133] Q. What is the most amount you've ever sold in a week?

A. Exactly I couldn't tell you how much I've sold in a week.

Q. You can't tell us how much you've sold in a month?

A. No.

Q. You really don't have any idea?

A. I know that — I know that — I mean I sold over 30 kilos during the time that I was selling but I can't tell you exactly, you know, how much.

Q. You sold over 30 kilos?

A. Yes, sir.

Q. Did you sell any kilos that you did not get from Mr. Perez?

A. Yes, on some occasions I sold — I sold kilos that Mike Perez didn't give me.

Q. How much — how many kilos did you sell that Mike Perez didn't give you?

Appendix M

A. How many kilos that Mike Perez didn't give me?

I don't know.

Q. No idea?

A. No, can't recall.

Q. Did the Government ever ask you how many kilos you sold when you were cooperating with them?

A. They asked me but I can't recall, I mean, whether I told them what amounts.

Q. Did you keep any records?

A. No, I didn't. I mean I only maintained, you know, I mean . . .

* * * *

APPENDIX N — FBI-302 REPORTING STATEMENT OF PEDRO PRIETO GONZALEZ DATED JUNE 15, 1994

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 6/17/94

PEDRO PRIETO GONZALEZ was interviewed in the U.S. Courthouse Room 3243, Philadelphia, Pa as part of a proffer agreement outlined in a letter provided to GONZALEZ's attorney, MICHAEL GIAMPETRO, by AUSA RONA WENIK. In addition to the interviewing agents, also present was AUSA WENIK and AUSA ROBERTA BENJAMIN. GONZALEZ advised he wanted to cooperate with the authorities in the investigation. He then provided the following information:

In the 2/26/93 conversation with MIKE PEREZ, PRIETO admitted that he was talking about purchasing 1 kilo of cocaine. He stated that he did not receive the kilo of cocaine they discussed.

He advised that he never bought or sold a kilo of cocaine for MIKE PEREZ but was with PEREZ when he was selling it. He advised that he never touched any of the cocaine during these deals.

PRIETO advised that he allowed MIKE PEREZ to use the basement of his house, 4810 B Street, to store money but not cocaine. He advised that he received no money for PEREZ using the basement.

PRIETO advised that he knows a Colombian woman named YOLANDA (LNU). He advised that she was a courier

from New York but did not come to his residence when she came but would go to FABIOLA ECHEVERRY's home.

He advised that he knew PEREZ had a number of customers but did not know the extent to which each was involved. He identified the following as a result of looking through a book of photos:

1. FABIOLA ECHEVERRY — lived with PEREZ.

2. FRANCISCO HERNANDEZ

3. NELSON DAVID GUZMAN — Big dealer for PEREZ

4. ISSAC BONILLA — customer

5. RICARDO HAINES — customer

6. CARLOS CINTRON — brother and customer

7. RUBEN RIVERA — aka ROBERT — heroin addict, was a client of GONZALEZ's at ACT.

8. NICOLAS DELGADO — aka Cheo — operated a store on 5th Street and was the Cheo on the drug records mentioned by SA O'NEILL at the detention hearing for MIKE PEREZ.

9. SUSANNA ROSA — aka SUZY — cousin of MIKE PEREZ

Appendix N

Investigation on 6/15/94 at Philadelphia, Pa.

File # 245B-PH-70161 Sub M

SA LYNN MONAHAN
by SA FRANK W. O'NEILL Date dictated 6/17/94

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

APPENDIX O — EXCERPTS FROM PEREZ SENTENCING TRANSCRIPT DATED SEPTEMBER 9, 1997

[commencing at page 8]

In addition, Mr. Haines helped Mr. Perez with cocaine in terms of the Lee Street address. He helped him unload, that was his testimony, unload 40 kilos of cocaine from a car. Mr. Perez helped him and he did it at the direction of Mr. Perez.

And Ramon Antonio Moya very specifically ran two stash-houses on behalf of Mr. Perez. One was a pizzeria, and he specifically was told by Mr. Perez where the hidden compartments were; he stored mainly cocaine, occasionally money, but he acted — very clearly from his testimony and from the transcripts — at the direction of Mr. Perez. It was always Mr. Perez, almost every tape-recorded conversation we introduced at trial had Mr. Perez as the central figure — when is he getting the cocaine in? — and there was testimony to that effect. He was the one who received the money from the New York suppliers.

And, finally, Pedro Prieto Gonzalez, he testified that his house was used to store cash for Mr. Perez, and again, it was clearly at the direction of Mr. Perez. And also that Mr. Perez counted the money at Mr. Gonzalez' house.

So I think the evidence was so overwhelming it's almost beyond a reasonable doubt, much less, a preponderance of the evidence, and therefore I think we've clearly established the leadership role on behalf of this defendant.

Appendix O

THE COURT: Rebuttal, Mr. Fitzpatrick?

MR. FITZPATRICK: My position, sir, is described . . .

* * * *

APPENDIX P — EXCERPTS FROM VOLUME 6 OF PEREZ TRIAL TRANSCRIPT

[commencing at page 6-6]

A. Just Cutin.

Q. And do you see that individual in the courtroom here today?

A. Yes, I do.

Q. Can you please identify him?

A. The gentleman over there (indicating), towards the left with the white shirt with the glasses on.

THE COURT: Identifying the defendant for the record.

BY MS. BENJAMIN:

Q. How did you know Edwin Rodriguez?

A. From a friend — from a friend buying cocaine from him.

Q. And did you actually receive cocaine from him?

A. Yes, I did.

Q. And speaking of February, '93 through March of '93, during that period, did you receive cocaine from him?

A. Yes.

Appendix P

Q. And do you know where he got his cocaine from?

A. From my knowledge from what he told me, from Mike Perez.

Q. Without telling us anything about receiving cocaine — anything before February of '93, did you know Edwin Rodriguez before February of '93?

A. No, I did not.

Q. Did you know him before February of '93 or — I'm talking about — without talking about anything with respect to cocaine — did you know him, had you met him before February of '93 — Edwin?

* * *

[6-41] A. I was dealing with Edwin before I started dealing with Mike and I was also dealing with a cousin of mines.

Q. And do you know who that was — do you remember who that was — the other person?

A. My cousin, yes. Robert Payne (phonetic).

Q. On Page 2 of the transcript, you say:

> So, it gonna be — be the one as the — as the last one, right? Remember the last one I just got from you Saturday.
>
> What were you talking about there?

Appendix P

A. The kilogram of cocaine I purchased from Mike Perez.

Q. And you say: With — you know — one was hard.

What did you mean by hard?

A. Hard, it wasn't like the one that was soft that fell. It was hard, solid.

Q. And is that good or bad?

A. That's — to me — is good.

Q. Then you say: I don't know if we can do anything back at Edwin's house, because his father just called here for me.

Right, et cetera.

What were you talking about there?

A. Edwin's dad said that — had asked Macho — Cutin's cousin, was I holding anything, drug or money in the house and I told him, no.

Q. So, you didn't tell him the truth, you told Edwin's father a . . .

* * * *

APPENDIX Q — EXCERPTS FROM PEREZ SENTENCING TRANSCRIPT DATED SEPTEMBER 9, 1997

[commencing at page 5]

. . . own.

I have also submitted with that an affidavit from one of the witnesses, Mr. Hernandez, that indeed that's exactly what happened and that there was never any control that my client had over anything. And if the government is not prepared to show that by a preponderance of evidence today, sir, I would respectfully and quite strongly urge this Court that they are not entitled to the four-level enhancement for being a supervisor of any sort of organization.

I would beg to point out to the Court that the fact that there an organization, and the initials of the organization, is really something that the government conceived when they drew this indictment. There was no one who testified on the witness stand that they belonged to an organization. There was no one who testified on the stand that their activities were in any way governed by or even known by my client. There is no one that said that they did things on behalf of the organization. They did things on behalf of themselves once they bought the drugs.

And with that in mind, sir, I would respectfully urge upon the Court that they not allow the enhancement for being a supervisor.

The only other issue that we have —

Appendix Q

THE COURT: Well, before you get to the next issue, let me address this and have the government respond.

* * * *

APPENDIX R — 1997 AFFIDAVIT OF FRANCISCO HERNANDEZ [sic] IN *UNITED STATES OF AMERICA v. FRANCISCO HERNANEZ*

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

Affidare

vs

FRANCISO, HERNANEZ,

Affiant

AFFIDAVIT

§§ In The State Of New Jersey
In The County Of Burlington

I, the affiant, Francisco Hernanez do hereby depose and affirm the following statements are true and correct:

1. I am currently under conviction for Conspiracy To Possess With Intent To Distribute Cocaine.

2. I am charged with conspiring with Mike Perez Criminal Action No#94-CR-192.

3. The extent of my conspiracy with Mike Perez was based upon my relationship with him as a buyer of cocaine. However, Mike Perez was not my only source of supple of cocaine.

Appendix R

4. Although, I associated with Mike Perez there was no managerial relationship existing between us, e.g. supervisor – worker, however there were occasions when I assisted him out-of friendship. Albeit, I was under no obligation to assist Mike Perez during the conspiracy.

WHEREFORE, I do hereby swear under the penalty of perjury, that the above statements are true and correct, pursuant to 28 U.S.C. § 1746.

Dated:

Sworn By: s/ [illegible]
Francisco Hermez
47831-066

Witnessed By: s/ Fahim Muhammed
Fahim Muhammed
00238-158

APPENDIX S — EXCERPTS FROM MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DENYING MOTIONS FOR JUDGMENT OF ACQUITTAL AND FOR A NEW TRIAL DATED AUGUST 26, 1996

[commencing at page 15]

. . . agreed that these exact factors, taken together, constituted sufficient cautioning to cure the error by the prosecutor. *See Zehrbach*, 47 F.3d at 1267.

Additionally, the extensive evidence outlined above against both defendant Perez and defendant Rodriguez supports the conclusion that the prosecutor's comment would not have prejudiced the jury's deliberations. Considering these factors as a whole, the Court finds that the comment made by the prosecutor constitute harmless error, and, therefore, the Motion for a Judgment of Acquittal or New Trial based on the ground that the prosecutor's comment prejudiced the defendants is denied.

D. *Defendant Perez's Allegation of Sentencing Entrapment*

Our Court of Appeals has not as yet addressed the theory of sentencing entrapment. *United States v. Raven*, 39 F.3d 428, 438 (3d Cir. 1994) ("We have not as yet had occasion to address the theory of sentencing entrapment described in *Rogers* and *Lenfesty*, and we do not do so today . . . ."). The Seventh and Eleventh Circuits have rejected the doctrine. *United States v. Garcia*, 79 F.3d 74, 76 (7th Cir. 1996) ("We now hold there is no defense of sentencing manipulation in

this Circuit."), *petition for cert. filed*, No. 95-9454 (U.S. June 20, 1996); *United States v. Williams*, 954 F.2d 668, 673 (11th Cir. 1992) ("we reject . . . [the] sentence entrapment theory.").

Although the Eighth Circuit did not expressly adopt the theory of sentencing entrapment, it describes the doctrine as [16] follows:

> "outrageous official conduct [which] overcomes the will of an individual predisposed only to dealing in small quantities" for the purpose of increasing the amount of drugs . . . and the resulting sentence of the entrapped defendant.

United States v. Rogers, 982 F.2d 1241, 1245 (8th Cir. 1993) (quoting *United States v. Lenfesty*, 923 F.2d 1293, 1300 (8th Cir. 1991)). And recently, in *United States v. Kaczmarski*, Criminal Action No. 95-616-01 (Aug. 15, 1996), Judge Dalzell adopted the reasoning of First Circuit Judge, Michael Boudin who established a test for proving sentence entrapment. *Id.* In *United States v. Egemonye*, 62 F.3d 425 (1st Cir. 1995), Judge Boudin held " 'where government agents have *improperly* enlarged the scope or scale of the crime,' the sentencing court has power to exclude 'the tainted transaction' from the guideline computations and for purposes of any mandatory minimum statute." *Id.* at 427 (quoting *United States v. Montoya*, 62 F.3d 1, 3 (1st Cir. 1995) (emphasis in *Montoya*)). *Montoya* (also authored by Judge Boudin), held that a defendant must demonstrate that the Government engaged in "extraordinary misconduct" in order to be entitled to a reduction in sentence. *Id.* at 4.

Appendix S

Using the Eighth or First Circuit definition, this Court finds that the Government did not engage in sentencing entrapment. First, the Government officials did not engage in outrageous conduct or extraordinary misconduct, by merely delaying its arrest of defendant Perez after it purchase one kilogram of cocaine from him on May 15, 1993. The Government did not try to encourage [17] defendant Perez to sell larger quantities of drugs at any time thereafter; it merely waited to gather more information on him and other potential defendants. This is not improper. The fact that he was more deeply implicated in a drug conspiracy is not enough.

Next, testimony by at least three witnesses revealed that defendant Perez received cocaine in quantities ranging from 20-40 kilograms. Therefore, he was already predisposed to dealing much larger quantities of cocaine. Therefore, any relief based on this theory is denied.

An appropriate Order follows.

* * *

Appendix S

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL ACTION

NO. 94-0192-01
NO. 94-0192-10

UNITED STATES OF AMERICA

v.

MIKE PEREZ, a/k/a MIGUEL PEREZ-CINTRON
a/k/a MIGUEL PEREZ

and

EDWIN RODRIGUEZ, a/k/a "CUTIN"

ORDER

AND NOW, this 26th day of August, 1996, upon consideration of Defendants' Motions for Judgment of Acquittal and in the alternative, Defendant Perez's Motion for a New Trial, IT IS HEREBY ORDERED that Defendants' Motions are **DENIED.**

BY THE COURT:

s/ Herbert J. Hutton
HERBERT J. HUTTON, J.

APPENDIX T — CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT V — GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * *

APPENDIX U — RELEVANT SENTENCING GUIDELINE

U.S.S.G. § 3B1.1

§ 3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

COMMENTARY

Application Notes:

1. *A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the*

*commission of the offense (**e.g.**, an undercover law enforcement officer) is not a participant.*

2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

3. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

4. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal

activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

Background: *This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (**i.e.,** the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.*

In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions

of responsibility. This is reflected in the inclusiveness of § 3B1.1(c).

(Effective November 1, 1987, and amended effective November 1, 1991 November 1, 1993.)

* * * *